

CALIFORNIA COASTAL COMMISSION

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Submitted: July 23, 2003
Staff: EL-SD
Staff Report: August 20, 2003
Hearing Date: September 10-12, 2003

STAFF REPORT: REVOCATION REQUEST

Application No.: R-6-01-129

Applicant: SeaWorld of California

Agent: Patrick Owen

Description: **(APPROVED SEPTEMBER 9, 2002)** Construction of a splash down water ride, consisting of three towers (95, 89 and 83 feet high), interior and exterior sets with water effects, a 130,000 gallon exhibit tank for up to ten Commerson Dolphins, a gift shop, snack stand, restrooms, and several accessory structures, located on approximately 5.5 acres along and within the southern border of the enclosed theme park, east of the visitor entrance and adjacent to the main parking lot.

Site: 500 SeaWorld Drive, Mission Bay Park, San Diego, San Diego County.
APN 760-037-01

Person Requesting Revocation: Sabrina Venskus, California Earth Corps

SUMMARY OF STAFF RECOMMENDATION

Staff recommends that the Commission deny the request for revocation on the basis that no grounds exist for revocation under Section 13105(a) of the Commission's regulations. The general topic of the landfill/toxic waste dump was extensively discussed during the Commission's review of the SeaWorld Master Plan in February, 2002. The main concern of the persons requesting revocation is that a January, 2002 Soil Vapor Study conducted for a site adjacent to the splash down ride location showed one very high count of hydrogen sulfide at one test well. The remainder of the opponents' contentions address potential errors in the application form and the absence of some reports and discussion of landfill/toxic waste dump issues in the permit findings. However, this issue was discussed at length during the public hearing for the SeaWorld Master Plan that occurred just seven months prior to the permit hearing and at which the Commission approved in concept the development subject to this permit. .

PROCEDURAL NOTE: The California Code of Regulations, Title 14 Division 5.5, Section 13105 states that the grounds for the revocation of a coastal development permit (or permit amendment) are as follows:

Grounds for revocation of a permit shall be:

- a) Intentional inclusion of inaccurate, erroneous or incomplete information in connection with a coastal development permit application, where the Commission finds that accurate and complete information would have caused the Commission to require additional or different conditions on a permit or deny an application;
- b) Failure to comply with the notice provisions of Section 13054, where the views of the person(s) not notified were not otherwise made known to the Commission and could have caused the Commission to require additional or different conditions on a permit or deny an application.

In addition, Section 13108(e) provides that if the Commission finds that the request for revocation was not filed with due diligence, it shall deny the request.

REQUESTOR'S CONTENTION:

The request for revocation contends that grounds for revocation in Section 13105(a) exist because the applicant submitted inaccurate, erroneous or incomplete information to the Commission in the coastal development permit application with regard to three issues, and that the submittal of accurate information would have led the Commission to deny the project. The three issues are the following:

- (a) The first allegation is that the applicant failed to disclose a January, 2002 soil vapor study which indicated a severe health risk from hydrogen sulfide gas in an area close to the proposed ride location. The study was prepared for the applicant and was thus in the possession and knowledge of the applicant before the Commission acted on the subject permit application. According to the person requesting revocation, geological conditions at the site make the threat more significant, as seismic activity could cause subsidence.
- (b) The second allegation is that the applicant failed to disclose studies and reports indicating the existence of an unlined and unfenced Class I hazardous waste dump underlying the SeaWorld leasehold. An industrial Class I hazardous waste dump had been operating in and around the ride location, and the exact dump boundaries are unknown. According to the person requesting revocation, numerous existing reports and studies addressing the toxic hazardous waste dump were not disclosed to the Commission with the coastal development permit application for the ride, and the staff report does not mention the dump. The applicant was aware, prior to Commission action on this permit, that a Technical Advisory Committee had been formed by the City Council to investigate the dump boundaries and any ongoing or potential leakage.

(c) The third allegation is that the applicant failed to disclose the existence of habitat areas in or near the proposed development and areas of state or federally listed rare, threatened or endangered species. According to the person requesting revocation, the project site is approximately 50 yards south of Pacific Passage, a primary least tern foraging area. Lights, noise and activity associated with the ride would interrupt and discourage use of the habitat. The site is approximately 120 yards north of a least tern nesting site, and the ride structure will obstruct the direct line of flight between the nesting and foraging areas. The project is approximately 250 yards north of the San Diego River Estuary and approximately 350 yards north of Famosa Slough, both functioning wetlands harboring listed species. Additional traffic and parking generated by the ride could increase stress and displace sensitive species. These concerns are not mentioned in the staff report.

STAFF RECOMMENDATION: Staff recommends that the Commission **reject** the request for revocation because the person raising objections has not met the test of section 13105 of the California Code of Regulations.

MOTION: I move that the Commission grant revocation of Coastal Development Permit No. 6-01-129.

The staff recommends a **NO** vote on the motion. Failure of this motion will result in denial of the request for revocation and adoption of the following resolution and findings. The motion passes only by affirmative vote of a majority of Commissioners present.

RESOLUTION TO DENY REVOCATION:

The Commission hereby denies the request for revocation of the Commission's decision on Coastal Development Permit No. 6-01-129 on the grounds that there is no:

- (a) Intentional inclusion of inaccurate, erroneous or incomplete information in connection with a coastal development permit application, where the Commission finds that accurate and complete information would have caused the Commission to require additional or different conditions on a permit or deny an application.

STAFF NOTE:

A revocation of a permit rescinds a previously granted permit. Even if the permit is vested, i.e. the applicant has undertaken construction of the project, if the Commission revokes the permit, the applicant is required to stop work and if wishing to continue, to reapply for a coastal development permit for the project. If the evidence shows that there are grounds for revocation, the Executive Director, upon receipt of a request for revocation, can order the project to stop work. Section 13107 provides, in part: "Where the executive director determines, in accord with Section 13106, that grounds exist for revocation of a permit, the operation of the permit shall be suspended." In this case, the

Executive Director has not determined that grounds exist for revocation and the operation of the permit is not suspended.

Because of the impacts on an applicant, the grounds for revocation are necessarily narrow. The rules of revocation do not allow the Commission to have second thoughts on a previously issued permit based on information that comes into existence after the granting of the permit, no matter how compelling that information might be. Similarly, a violation of the Coastal Act or the terms and conditions of a permit or an allegation that a violation has occurred are not grounds for revocation under the California Code of Regulations. **The grounds for revocation are, of necessity, confined to information in existence at the time of the Commission's action.**

II. Findings and Declarations.

The Commission finds and declares as follows:

A. Detailed Project Description/Location. The subject permit authorized construction of a new attraction within the existing SeaWorld theme park consisting of a splash down water ride themed as the Lost City of Atlantis. The ride is proposed as a multi-structure, and multi-level, complex, and is approximately two-thirds complete at this time. The primary structures include one building with three towers (83, 89 and 95 feet in height), interior and exterior sets with water effects, and a 130,000 gallon exhibit tank for up to ten Commerson Dolphins. Accessory structures include a gift shop, snack stand, restrooms, and various operation and maintenance structures. The ride would be located on approximately 5.5 acres within the southern border of the developed theme park, east of the visitor entrance and adjacent to the main parking lot. SeaWorld is located within Mission Bay Park in the City of San Diego. It is situated adjacent to Mission Bay and is surrounded largely by City parklands consisting of grassy, open areas.

This was the first application for development under the new SeaWorld Master Plan Update, which the Commission voted to certify in February, 2002. The new master plan addresses build-out of SeaWorld over the next 15-20 years, and is divided into Tier 1, Tier 2 and Special Projects. The splash down ride is a Tier 1 project, and was described in detail in the master plan. An EIR was prepared, circulated for public review and approved by the City of San Diego for the master plan, which looked at the overall plan but also analyzed potential impacts and mitigation requirements for the identified Tier 1 projects. In approving the Master Plan as an LCP amendment, the Commission certified the plan with a number of suggested modifications. One modification was to relocate the splash down ride from the proposed master plan site on the bayfront to an area more within the developed areas of the park. This was done primarily to limit adverse impacts to views from public recreational areas outside SeaWorld, and also because the proposed master plan location did not provide an adequate setback from the riprapped shoreline of Mission Bay. The certified location occupies an area along the southern perimeter of the enclosed theme park, encroaching slightly into the existing main parking lot. Before the beginning of construction, this area was entirely paved.

B. Summary of Revocation Request's Contentions. The revocation request has been filed by Sabrina Venskus, representing California Earth Corps. Although their contentions are summarized below, the full text of the revocation request and attachments are included as Exhibit #1.

The revocation request (Exhibit #1) asserts that intentional inclusion of inaccurate, erroneous or incomplete information which, if known to the Commission, would have caused different conditions or denial of the permit are grounds that exist for the revocation of this permit. In summary, the allegations are: 1) that the applicant failed to disclose a January, 2002 soil vapor study which indicated a triple checked detection of over 1,820 ppm of hydrogen sulfide gas in a test well approx. 315 ft. from the Ride, and, the close proximity of the test well to an intense public use area such as the proposed Ride is extraordinarily significant, given the nearby incident involving H₂S poisoning cause the death of one person and hospitalization of eight others in 1988; 2) that the applicant knowingly failed to disclose that an industrial Class I hazardous waste dump had been operating in and around the location of the Ride, and that the exact boundaries of the toxic hazardous waste dump are unknown; also, the applicant did not disclose studies and reports indicating the existence of the toxic hazardous waste dump, the staff report does not mention the dump, and the applicant was aware that a Technical Advisory Committee (TAC) had been formed by the San Diego City Council to address the boundaries of the dump vs. the City landfill and to what extent the dump's chemicals are leaking and migrating; and 3) that the applicant failed to disclose the existence of sensitive habitat areas in or near the proposed development and areas of state or federally listed rare, threatened or endangered species.

The contention notes that these concerns are not mentioned in the staff report, and the various supporting documentation is not in the subject permit file. In addition, the contention states that a subsequent denial by the Commission of an application to pave a portion of an adjacent site directly over the landfill/toxic waste dump for use as a parking lot proves the Commission would have denied the ride if the 2002 Soil Vapor Study, and other documentation, had been provided at the time. The contention does not allege that grounds for revocation exist pursuant to Section 13105(b) for failure to comply with notice requirements.

C. Analysis of the Revocation Request's Contentions with Respect to Section 13105 of the California Code of Regulations. As stated, the grounds for revocation are, of necessity, confined to information in existence at the time of the Commission's action. In this case, the Commission approved the subject permit on September 9, 2002. The three elements that must be proved before a permit can be revoked under Section 13105 (a) are:

- That the applicant provided inaccurate, erroneous or incomplete information,
- That the inaccurate, erroneous or incomplete information was supplied knowingly and intentionally, **AND**

- That if the Commission had accurate and complete information at the time it approved the application, it would have required additional or different conditions or denied the application.

D. Intentional Inclusion of Incomplete or False Information Provided by Applicant. The contention raised in the revocation request alleges grounds for revocation identified in Section 13105 (a) of the California Code of Regulations.

1. 2002 Soil Vapor Study. The Commission finds no evidence that SeaWorld deliberately withheld critical information in conjunction with the splash down ride permit review. The 2002 Soil Vapor Study was prepared by IT Corporation for SeaWorld, as required by the City of San Diego Solid Waste Local Enforcement Agency, and was given to the City on January 4, 2002, and to the Regional Water Quality Control Board on January 7, 2002; it has been available for public review since that time. These are the two public regulatory agencies charged with oversight of the landfill/toxic dump. The report provides results and recommendations from testing conducted in October, 2001, and does not address the splash down ride site specifically, but rather an undeveloped piece of land nearby the ride site. The report concludes that the site is similar to many others in Southern California near landfills and that development can occur consistent with common engineering practices. Page 4-4 of the report lists specific recommendations, and is part of Exhibit #1, attached.

Although the application for the splash down ride was submitted to this office in 2001, it was incomplete and held in abeyance during review of the SeaWorld Master Plan. The permit application file included a geological report for the then-proposed site, which was also part of the master plan review. Certification of the master plan included relocation of the splash down ride. Thus, when the master plan was certified, the applicant provided new plans for the ride in the location approved by the master plan. At that time, the application was filed and scheduled for Commission action. SeaWorld was not asked to submit new geological studies because the relocated site was also reviewed in the master plan as the future site for an expanded events center. Although the 2002 Soil Vapor Study was in existence by that time, it addresses only the SeaWorld 16-acre expansion area, and not the specific site of the splash down ride. Thus, although the Commission and its staff were unaware of the 2002 Soil Vapor Study at the time the Commission approved the subject permit, it does not contain relevant information, since the report does not directly address the relocated site of the splash down ride.

California Earth Corps claims that the Commission was not aware of the 2002 report when it acted on the splash down ride, but was aware of it when the Commission subsequently denied a permit application for paving a portion of the nearby expansion area. California Earth Corps contends that this information was pivotal in the Commission's action to deny Coastal Development Permit #6-03-006 for the parking lot. In reviewing the file and listening to the hearing tapes, there is nothing to indicate that the 2002 Soil Vapor Study was relied on in the Commission's decision to deny the permit. The report was not part of the file itself, and only one public speaker testified at the hearing; the report was not mentioned in that testimony, nor in any of the subsequent Commission discussion prior to the vote to deny. The Commission was aware of the Technical Advisory Committee (TAC) that is conducting current tests and studies

through reference in the staff report, and also felt that solutions other than capping the landfill with pavement might be more appropriate. It was also pointed out that most of the parking lot area was not required by SeaWorld immediately, but was intended to serve future development. This being the case, the Commission denied the application, with the intent that results and recommendations from the TAC would be available before the Commission reviewed the parking lot proposal again.

Thus, the Commission's denial of CDP #6-03-006 was not based on the 2002 Soil Vapor Study. Moreover, that proposal was for improvements directly over the landfill on area that had not previously been improved. The subject permit for the splash down ride is in a location not over the mapped landfill/toxic dump boundaries, and in a location already surfaced and used as a parking lot and portions of the improved theme park. Moreover, a significant portion of the parking lot will remain between the approved ride and the landfill/toxic dump.

2. Presence of Toxic Waste Dump. The contention that the Commission was unaware of the existence of the landfill/toxic dump and that it underlies the SeaWorld park is also not supported by the facts. This issue was widely discussed in the EIR, staff report, public testimony, and Commission discussion at the time of SeaWorld's Master Plan certification in February, 2002. That review included not only the master plan document, but an analysis of all the Tier I developments in the plan. The splash down ride received a great deal of attention at the public hearing, since staff was recommending it be relocated further from the water, and since both the public and the Commission recognized it as a very significant project that would be coming back to the Commission for permit approval in short order. In fact, the Commission approved the CDP for the ride only seven months after it acted on the master plan. The fact that the staff did not raise the same concerns again with the permit review was because the core issues of the ride had been resolved through the master plan certification process. Likewise, staff did not require the applicant to resubmit all the background materials with the permit application that had already been received and reviewed with the master plan. Staff did cite the Mission Bay Precise Plan, SeaWorld Master Plan, and EIR for both as substantive file documents in the permit staff report.

The revised findings for the City of San Diego LCP Amendment No. 2-2001-C (Sea World Master Plan) state the following:

"A portion of the eastern Sea World leasehold is underlain by the inactive Mission Bay Landfill. The City of San Diego operated the landfill from approximately 1952 until 1959. The landfill reportedly accepted municipal solid waste and some liquid industrial wastes (including acids, alkaline solutions, solvents and paint wastes). The U.S. Environmental Protection Agency estimates that up to 737,000 gallons of industrial wastes may have been disposed at the landfill during its operation. After closure of the landfill, dredged material from Mission Bay (consisting of mostly fine-grained material) was placed on top of the former landfill surface to a depth of approximately 15 feet. A portion of the site is currently paved with a chip-seal

paving surface which allows for diffusion of landfill gasses while remaining impervious to water infiltration.

Several investigations of the landfill were conducted to evaluate the extent of potential chemical contamination. Samples for chemical analysis were collected from soils, surface water, sediments and groundwater from the landfill and surrounding areas. Investigations detected a number of chemicals in onsite soils and groundwater including heavy metals, volatile and semi-volatile organic compounds and chlorinated pesticides. In 1985, the Regional Water Quality Control Board (RWQCB) adopted Order No. 85-78, which required, among other things, routine monitoring of groundwater, surface water and sediments from Mission Bay and the San Diego River. In addition to routine monitoring, several additional soil and groundwater investigations were conducted in and around the landfill through 1997. The results of these investigations and continued routine monitoring indicate that low levels of chemicals were detected in soils and groundwater beneath and adjacent to the landfill. According to the RWQCB, these low levels of chemicals do not represent a significant threat to public health or the environment. Furthermore, the California Department of Toxic Substances Control (DTSC) and U.S. EPA previously evaluated the site in 1987 and 1993, respectively, and determined that the site did not pose a significant threat (see attached letters from the DTSC and RWQCB).

The RWQCB continues to be the lead agency for oversight for water quality issues at the Mission Bay Landfill. The City of San Diego continues to monitor the site in accordance with RWQCB Order 97-11, General Waste Discharge Requirements for Post-Closure Maintenance of Inactive Nonhazardous Waste Landfills. Routine monitoring has detected low levels of several chemical constituents in groundwater beneath and adjacent to the site. However, the concentrations of these chemicals have been well below any of the established action levels identified by the RWQCB, and do not appear to represent a significant threat to public health or the environment. The site is currently in compliance with the requirements of the City of San Diego Solid Waste, the RWQCB, and California Integrated Waste Management Board.

Commission staff has received public comments related to the presence of contaminants in groundwater beneath the landfill and the potential for migration of these chemicals offsite. The Commission's Water Quality staff has reviewed the available monitoring data regarding groundwater conditions at the Mission Bay Landfill. Staff concludes that data supports the determinations by the regulatory agencies overseeing the landfill that the low levels of chemicals detected do not represent a significant threat to public health or the environment. The same public comments were submitted during the comment period for the *Draft Environmental Impact Report for the Proposed Sea World Master Plan Update (EIR)*, dated March 12, 2001. These comments and related issues were fully and adequately analyzed by the lead agency in the Final EIR."

At time of review of the master plan and the ride application, the Commission was aware the landfill was alleged by members of the public to be a toxic waste dump. Submitted studies and documents, including but not limited to, the *Site Inspection Prioritization* prepared by Bechtel Environmental, Inc. in 1993 and the *Assessment Report SeaWorld Lease Expansion* prepared by Fluor Daniel GTI in 1997 acknowledged the site had been the recipient of up to 737,000 gallons of various industrial wastes, including waste acids, alkaline solutions, organic solvents and paint wastes. These reports are part of a binder submitted by SeaWorld during the master plan review. Two of the other documents in the binder include a lease amendment and the *Post Closure Land Use Plan for Mission Bay South Shores Phase III*. When this volume of material is already on record at the Commission office, it is not usual for copies of all such data, monitoring results, studies, etc. to again be submitted as part of a subsequent permit application. In addition, it was acknowledged there is some degree of uncertainty in the exact boundaries of past waste disposal operations at the Mission Bay Landfill. One of the objectives of the Technical Advisory Committee (TAC) is to investigate more closely the boundary of the landfill.

However, the location of the Splashdown Ride is within the already developed portion of the park and not immediately adjacent to the currently mapped landfill. An existing parking lot occupies the area between the ride site and the historic landfill. In addition, while the City has indicated the exact limits of the landfill have not been defined, numerous soil borings have been made in around the landfill, providing a basis for some understanding of the limits of trash. As part of the geotechnical investigation for the Ride, eight soil borings were within the project site and no trash was encountered.

Further, as part of the review by the TAC, the City Environmental Services Division has contracted with SCS Engineers to reevaluate the existing monitoring program and perform a full assessment to determine if the landfill poses a threat to the public or the environment. The scope of the work includes: 1) review of all previous investigations performed on the site; 2) development of a Site Assessment Plan (SAP) identifying the potential chemicals of concern and appropriate screening criteria; 3) implementation of the approved SAP; and 4) preparation of a final Site Assessment Report including recommendations if warranted. It is anticipated the draft SAP will be presented to the TAC in November 2003 for their input and comment. Implementation of the approved SAP will begin in 2004 with a final report expected in July 2004.

3. Proximity to Sensitive Habitats. The third allegation that the Commission was unaware of the existence of sensitive habitats and listed species in the general vicinity is also not substantiated. These matters were discussed extensively during the master plan review, and in relation to several past CDPs for SeaWorld projects. The presence of sensitive floral and faunal resources in the general area was one reason the ride was relocated further from the water's edge. Moreover, although these resources do exist throughout various parts of Mission Bay Park, their distance from the splash down ride location exceeds the Commission's typical buffer requirements. There are fully functioning wetlands in the Southern Wildlife Preserve south of SeaWorld, at a distance of about 1,200 feet from the splash down ride construction site. It appears that the

numbers given in the request for revocation are incorrect, as scaled plans of the area indicate a much greater distance between the ride and the identified sensitive features.

In addition, there are two designated least tern nesting sites, one located across Pacific Passage to the north (inactive for many years), and the other located between SeaWorld Drive and the Southern Wildlife Preserve south of SeaWorld (also inactive). These are located approximately 2,000 feet north and 600 feet south of the splash down ride site, respectively. The closest active least tern nesting sites are all a mile or more from SeaWorld.

4. Incomplete Filing Materials/Application. California Earth Corps has contended that SeaWorld's intent to supply incomplete or false information is proven by some of the responses in the application form. In particular, any updated geology reports and the 2002 Soil Vapor Report were not submitted as required in the application. The other contention is that the applicant responded "no" to questions of whether the site is within or nearby sensitive resources. With respect to the first issue, the identified reports did not exist at the time the application was submitted. When SeaWorld completed the file with updated plans nothing else was requested. The updated geology report is a requirement of the master plan prior to the issuance of building permits. Since the 2002 Soil Vapor Study is for a different site, SeaWorld was not required to submit it for the ride application. With respect to the questions about sensitive resources, no such resources exist on the ride site itself, or elsewhere within the developed portions of the SeaWorld leasehold. Whether or not SeaWorld is "near" such resources is subjective. Since it has been shown that the ride site is not within what would typically be a buffer zone, the Commission finds the "no" answer reasonable, and finds it does not represent a deliberate intent to deceive.

E. Affect of Complete and Accurate Information on the Commission Action. The question of whether such information would have swayed the Commission's decision on the subject permit is as significant as whether disclosure of all material was intentional or not. Earlier reports submitted with the master planning documents included the results of a significant amount of soil and water testing, including acknowledgement that both methane and hydrogen sulfide gases were present on the nearby landfill/toxic waste dump site. However, these reports did not indicate any existing public danger due to the low concentrations of these substances. Thus, the Commission was well aware of the existence and contents of the landfill/toxic waste dump when it approved the subject permit. The only additional information provided in the 2002 Soil Vapor Study was that one test well had produced an abnormally high reading for hydrogen sulfide during one test. The report itself goes on to state that this was either an anomaly or the result of a deposit of sulfur materials close to the probe, which took the sample from 15 feet underground, not on the ground surface. The report does not conclude that any immediate human health hazard exists at the site of the splash down ride, and monitoring for landfill gases continues at this time as recommended. The Commission's Water Quality Unit has reviewed the Soil Vapor Study, and did not feel that public health concerns were raised by its findings.

In its review of issues surrounding the presence of a historic landfill that may contain hazardous materials, the Commission must rely on the expertise of the number of agencies who have direct jurisdiction over control of discharges and emissions, both solid and gaseous, on land and in air and water, to reach conclusions regarding the presence of public health risks. As indicated in the attached correspondence from the City of San Diego Environmental Services Division and the Regional Water Quality Control Board (RWQCB), these agencies were aware, at the time of approval of the Splashdown Ride, of the results of the soil vapor assessment discussed in the January 2002 study and the ongoing efforts of the TAC to further investigate the limits of the landfill and potential need for remediation. However, there is no indication the continued buildout of SeaWorld park in the already developed portion of the leasehold and not the site of the historic landfill, poses any risk to health and safety of the park users.

The Commission finds nothing in this study that would suggest its inclusion in the permit review would have led to any different outcome than the Commission's September 9, 2002 approval with conditions. Therefore, there is no evidence of intentional inclusion of inaccurate or incomplete information, or that such inaccurate or incomplete information, had it been corrected or completed and presented to the Commission, would have caused the Commission to impose different conditions or deny the project.

5. Conclusion

The revocation request does not demonstrate that the applicant knowingly and intentionally provided inaccurate, erroneous, or incomplete information. Thus, the grounds necessary for revocation under Section 13105(a) of the Regulations has not been met. The Commission finds that the revocation request shall be denied because the contentions raised in the revocation request do not establish the grounds identified in Section 13105 (a) of the California Code of Regulations.